No. 79-1896

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MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARKANSAS LOUISIANA GAS CO., PETITIONER

v.

FRANK J. HALL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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This brief is filed on behalf of the United States and the Federal Energy Regulatory Commission in response to the Court's invitation of October 6, 1980.

QUESTION PRESENTED

Whether, in calculating damages for a breach of contract, the Louisiana courts permitted the respondents to recover from the petitioner rates for natural gas in excess of applicable rate ceilings established by the Federal Energy Regulatory Commission.

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STATUTE AND REGULATIONS INVOLVED

Section 4 of the Natural Gas Act, 15 U.S.C. 717c, and the Commission's pertinent regulations, 18 C.F.R. 154.92-154.95, 157.40, are set forth in the petition for a writ of certiorari in No. 78-986, at Pet. App. 48a-50a, 52a-60a. The applicable Commission area rates, 18 C.F.R. 154.109a, as added by Opinion No. 607, Docket No. AR67-1, *et al.*, are set forth at Pet. App. 125a.

STATEMENT

This petition is the third arising from contract litigation between respondents and the Arkansas Louisiana Gas Company ("Arkla") before the state courts of Louisiana. The underlying facts of the case are more fully described in our response to the first petition, *Arkansas Louisiana Gas Co.* v. *Hall*, cert. denied, 444 U.S. 878 (1979), rehearing denied, No. 78-986 (July 2, 1980) (Amici Br. 2-10), as supplemented by our response to the second petition, *Arkansas Louisiana Gas Co.* v. *Hall*, No. 78-1789 (Amici Br. 2-6).

Briefly restated, the facts are that in 1952 Arkla and respondents entered into a gas purchase contract, under which Arkla agreed to pay respondents increased rates to match any higher rate that Arkla as a buyer paid to any other "party seller" in the Sligo field of Northern Louisiana. This provision for conditioning a price adjustment is known as a "favored nations clause." After 1954, the Commission issued a certificate permitting respondents to sell gas to Arkla under that contract.

In 1974, respondents sued Arkla in a Louisiana state court for breach of contract, claiming that Arkla was violating the favored nations clause. Specifically, respondent alleged that in 1961 Arkla had leased certain government owned land in the Sligo field, and that

Arkla's payments to the United States for gas and liquids produced from the leasehold triggered respondents' rights to higher prices under the favored nations clause. Arkla contended that under the doctrine of primary jurisdiction the question whether its lease payments constituted "purchases" within the meaning of the favored nations clause should be decided by the Commission. Both the state courts and the Commission rejected this contention and this Court denied Arkla's petition for certiorari on the question of primary jurisdiction. *Arkansas Louisiana Gas Co.* v. *Hall*, cert. denied, 444 U.S. 878 (1979), rehearing denied, No. 78-986 (July 2, 1980).

The second petition filed by Arkla concerns the period for which respondents are entitled to damages. The state trial and intermediate appellate courts both held that Arkla's payments to the United States after 1961 had triggered the favored nations clause, but that under the "filed rate doctrine" of *Montana-Dakota Utilities Co.* v. *Public Service Co.*, 341 U.S. 246 (1951),[1] the amounts to which respondents were lawfully entitled were limited to the specific rates on file with the Commission and respondents thus could not be awarded any additional amounts based on an alleged breach of contract. The courts further ruled, however, that the filed rate doctrine did not bar respondents from recovering damages for the period after October 1972, when respondents acquired "small producer" status and were no longer required to file rate schedules with the Commission.[2] The Louisiana

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[1]Under that doctrine a regulated company may collect for particular sales only the rates contained in its Commission rate schedules for the period in question. "It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co.* v. *Public Service Co.*, *supra*, 341 U.S. at 251.

[2]A "small producer" is defined in the Commission's regulations as an independent natural gas producer whose total sales in certain categories do not exceed 10 million Mcf per year. 18 C.F.R. 157.40.

Supreme Court reversed in part, concluding that, notwithstanding the filed rate doctrine, respondents should be permitted to recover damages from 1961 because Arkla had prevented respondents from filing increased rates with the Commission by not informing respondents of its lease payments.

Arkla then sought review in this Court of the Louisiana Supreme Court's decision. *Arkansas Louisiana Gas Co.* v. *Hall*, No. 78-1789. In response to the Court's invitation, we filed a brief expressing the view that the ruling of the Louisiana Supreme Court was incorrect and contrary to the filed rate doctrine. We also advised the Court that the Commission had under consideration an application by respondents for a waiver of the Commission's filing requirements. In a supplemental memorandum in No. 78-1789, we have informed the Court that the Commission has voted to deny respondent's application for a waiver and we have recommended that the Court grant Arkla's petition for a writ of certiorari in that case and reverse the judgment of the Louisiana Supreme Court.

While these other matters were pending, the state trial court was in the process of making a definitive calculation of the amount of damages Arkla owed to respondents. The trial court denied Arkla's motion to introduce evidence that allegedly showed that respondents' damage claims, if upheld, would result in Arkla's paying rates in excess of those authorized by the Commission (Pet. 10; Pet. App. 134a-142a). The Louisiana Court of Appeal affirmed the trial court's award of damages (Pet. App. 105a-117a). The court rejected Arkla's contention that the award exceeded the Commission's maximum ceiling rates, relying on previous statements by the Louisiana Supreme Court and the Commission that the damages awarded to respondents fell within the area ceiling rates prescribed by the Commission (*id.* at 116a). The Louisiana Supreme Court denied review and Arkla filed this petition.

DISCUSSION

1. Arkla contends that the damages awarded to respondents have caused respondents' rates for gas to exceed applicable ceiling rates established by the Commission. The decision of the Louisiana Court of Appeal rejecting Arkla's contention is based in part on the Commission's conclusion, in its order refusing to exercise primary jurisdiction, that "the damages do not exceed applicable area ceiling rates" (78-986 Amici Br. App. 13a; 78-1789 Amici Br. App. 13a). Upon careful reexamination of the information available to it, the Commission has determined that its earlier conclusion was based on an incorrect understanding of the contract between Arkla and respondents that is involved in this case. At the present time the Commission is unable to determine conclusively whether its ceiling rates have been exceeded as a result of the damages awarded to respondents. Accordingly, further proceedings are necessary and, to that end, we submit that the judgment of the Louisiana Court of Appeal should be vacated and the case remanded to the Louisiana courts. If that course is followed, the Commission would assist in reaching a determination whether the present damage awards exceed the permissible ceiling rates.

2. In 1971, the Commission ruled that small producers with favored nations clauses could not receive rates in excess of the Commission's ceiling rates for large producers. Order No. 428, 45 F.P.C. 454, 455 (1971). Consequently, as all parties to this case appear to agree, respondents may recover damages under the favored nations clause only to the extent that those damages do not cause the rates Arkla must pay for respondents' gas to exceed the appropriate ceiling rates[3] in Northern

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[3]In 1975 the Commission modified its earlier rule to permit small producers with favored nations clauses to collect up to 130% of the large producer ceiling rates. Opinion No. 742, Docket No. R-393, at

Louisiana. Those maximum rates are set forth in Commission Opinion No. 607 (Pet. App. 125a-133a).

This limitation, of course, applies only to products within the Commission's jurisdiction. Gas may be sold at the mouth of the well (the wellhead) or after the removal of liquids or other impurities at processing plants. At the wellhead, the Commission has jurisdiction over the entire gas stream, including those molecules later processed into liquids. See *Mobil Oil Corp.* v. *FPC*, 483 F. 2d 1238, 1248 n.123 (D.C. Cir. 1973), citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 820 n.111 (1968). With respect to sales at the plant, however, once liquids have been extracted the Commission's authority extends only to the gas itself (*i.e.*, the residue gas).

The Commission's previous conclusion (78-986 Amici Br. App. 13a; 78-1789 Amici Br. App. 13a) that "the damages does not exceed applicable area ceiling rates," was premised upon the erroneous belief that Arkla's contract with respondents was based on sales at the plant, and not at the wellhead. As a result of this incorrect interpretation, the Commission eliminated from its calculations those damages that apparently represented payment for removable liquids, and found that the damages awarded for the actual gas (*i.e.*, residue gas) were within the area ceiling rates. That premise is now undermined by the ruling of the Louisiana courts (Pet. App. 116a-117a) that Arkla's contract with respondents provided for sales of the entire gas stream at the wellhead, including removable liquids.

6-7 (Aug. 28, 1975). Thus, for the period between August 28, 1975, and December 31, 1975, respondents were entitled to 130% of the large producer area rate for Northern Louisiana.

Thus, for purposes of applying the Commission's ceiling, damages must be considered on the basis of wellhead sales. Upon review of the available data, the Commission is presently unable to determine whether the damages awarded have caused respondents' rates to exceed permissible levels. We therefore recommend that the case be remanded to the Louisiana courts to permit the parties to present additional evidence on this question.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Louisiana Court of Appeal should be vacated, and the case should be remanded to the state courts for further proceedings to determine whether, in calculating damages, the Louisiana courts permitted respondents to recover rates for natural gas exceeding the Commission's applicable rate ceilings.

Respectfully submitted.

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NOVEMBER 1980

DOJ-1980-11